

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

De'MARIAN CLEMONS,

Plaintiff,

v.

ROBERT CLINTON HAYES, M.D.;  
GABLE, M.D.; NAPHCARE; and  
ELIZABETH L. ACEVEDO,

Defendant/ Respondent.

Case No. 2:10-cv-01163-KJD-PAL

**ORDER**

Presently before the Court is Defendant Elizabeth L. Acevedo's Motion to Dismiss (#18). Plaintiff filed a Response in opposition (#23) to which Defendant replied (#27).

**I. Procedural History**

On October 27, 2010, Plaintiff De'Marian Clemons ("Clemons") filed the present Complaint (#5) against health care professionals at the prison where Clemons was incarcerated. Three counts of the Complaint contain claims against a nurse at the prison, Defendant Elizabeth L. Acevedo ("Acevedo"): Count VII, Count VIII, and Count IX. On October 27, 2010, the Court dismissed Counts VIII and IX in their entirety (#4). Clemons' only remaining claims against Acevedo are within Count VII. Therein, Clemons asserts that Acevedo was negligent and violated his physician-

1 patient privilege and his Eighth Amendment rights. Acevedo has moved to dismiss all remaining  
2 claims against her, including Clemons' request for injunction.

3 **II. Motion to Dismiss**

4 Pursuant to Fed. R. Civ. P. 12(b)(6), a court may dismiss a plaintiff's complaint for "failure  
5 to state a claim upon which relief can be granted." A properly pled complaint must provide "a short  
6 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.  
7 8(a)(2); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule 8 does not require  
8 detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation  
9 of the elements of a cause of action." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Papasan  
10 v. Allain, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise above the  
11 speculative level." Twombly, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint  
12 must contain sufficient factual matter to "state a claim to relief that is plausible on its face." Iqbal,  
13 129 S. Ct. at 1949 (internal citation omitted).

14 In Iqbal, the Supreme Court clarified the two-step approach district courts are to apply when  
15 considering motions to dismiss. First, the Court must accept as true all well-pled factual allegations  
16 in the complaint; however, legal conclusions are not entitled to the assumption of truth. Id. at 1950.  
17 Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not  
18 suffice. Id. at 1949. Second, the Court must consider whether the factual allegations in the  
19 complaint allege a plausible claim for relief. Id. at 1950. A claim is facially plausible when the  
20 plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the  
21 defendant is liable for the alleged misconduct. Id. at 1949. Where the complaint does not permit the  
22 court to infer more than the mere possibility of misconduct, the complaint has "alleged—but not  
23 shown—that the pleader is entitled to relief." Id. (internal quotation marks omitted). When the  
24 claims in a complaint have not crossed the line from conceivable to plausible, plaintiff's complaint  
25 must be dismissed. Twombly, 550 U.S. at 570.

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1           **A. Negligence**

2           Acevedo asserts that this claim should be dismissed because Clemons did not file an affidavit  
3 supporting his allegations as required under NRS 41.071. Pro se litigants are not held to the same  
4 standard as admitted or bar licensed attorneys. Haines v. Kerner, 404 U.S. 519, 521 (1972).  
5 Pleadings by pro se litigants, regardless of deficiencies, should only be judged by function, not form.  
6 Id. Therefore, Clemons' failure to attach an affidavit to his Complaint is inconsequential and not  
7 grounds for dismissal.

8           Clemons' negligence claim is governed by NRS 41A.015 because it is undisputed that Nurse  
9 Acevedo is a provider of healthcare. Under NRS 41A.015, "'Professional negligence' means a  
10 negligent act or omission to act by a provider of health care in the rendering of professional services,  
11 which act or omission is the proximate cause of a personal injury or wrongful death." See, e.g., Fierle  
12 v. Perez, 219 P.3d 906, 911 (Nev. 2008).

13           Clemons bases his negligence claim on three allegations against Acevedo. First, he alleges  
14 that one night after he fell while using the bathroom, Nurse Acevedo recommended to the attending  
15 guard that Clemons be allowed to get some fresh air and told the guard that Clemons would be fine  
16 because she had checked his blood pressure earlier. Second, he alleges that the day after his fall he  
17 approached Nurse Acevedo while she was dispensing pills to inmates and he asked her for some  
18 Tylenol, but she declined. Third, he alleges that a few weeks later while Nurse Acevedo was  
19 dispensing pills, he approached her and asked her to check his blood pressure. She told him she  
20 would check his blood pressure when she was done with other inmates, however Acevedo did not  
21 check his blood pressure because Clemons chose to leave and go back to his room. A few hours later  
22 another nurse checked his blood pressure instead. Clemons argues that Acevedo was negligent  
23 because she should have checked his vitals, temperature, and blood pressure, "just in case he passed  
24 out." He claims to now suffer from headaches.

25           Here, Clemons does not allege that Acevedo's recommendation that he get some fresh air  
26 after his fall, her decision not to give him Tylenol on one occasion, or her request that he wait until

1 she checked other inmates before she checked his blood pressure caused him any injury. Rather, he  
 2 argues that she should have acted differently because he may have passed out. Because he does not  
 3 allege facts that support a claim that Acevedo caused him harm, Clemons has failed to state a claim  
 4 for which relief can be granted. Accordingly, the negligence claims against Acevedo are dismissed.

#### 5 **B. Physician-Patient Privilege**

6 Clemons asserts that Acevedo violated the physician-patient privilege. Clemons does not  
 7 specify under which law he is bringing his claim, but the relevant Nevada statute is NRS 49.225,  
 8 which states:

9 A patient has a privilege to refuse to disclose and to prevent any other person from disclosing  
 10 confidential communications among the patient, the patient's doctor or persons who are  
 11 participating in the diagnosis or treatment under the direction of the doctor, including  
 12 members of the patient's family.

13 Here, Clemons has not mentioned any confidential communications which Acevedo may have  
 14 disclosed nor any confidential communications between him and Acevedo in general. Therefore,  
 15 Clemons has failed to state a claim for which relief can be granted under NRS 49.225.

16 If Clemons is attempting to state a federal claim under the Health Insurance Portability and  
 17 Accountability Act or 1996 ("HIPPA"), it must be dismissed because "HIPPA itself provides no  
 18 private right of action." Seaton v. Mayberg, 610 F.3d 530, 533 (9th Cir. 2010). Accordingly, the  
 19 physician-patient privilege claims against Acevedo are dismissed.

#### 20 **C. Eight Amendment**

21 Clemons asserts that Acevedo violated his Eight Amendment rights based on the same facts  
 22 he relies upon for his negligence claim.

23 In order for an inmate to support a claim under 42 U.S.C. §1983 against individual medical  
 24 providers, he must demonstrate "deliberate indifference" on the part of medical personnel. Estelle v.  
 25 Gambler, 429 U.S. 97, 104 (1976). Deliberate indifference is defined as the "unnecessary and  
 26 wanton infliction of pain." Id. "In the medical context, an inadvertent failure to provide medical care  
 cannot be said to constitute an 'unnecessary and wanton infliction of pain' or to be 'repugnant to the

conscience of mankind.” Id. at 105-106; Wilson v. Seiter, 501 U.S. 294 (1991). The test for deliberate indifference is: (1) that the indifference could result in further significant injury; and (2) that there was a purposeful act or failure to respond to prisoner’s pain or medical need which resulted in harm. Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). “[I]n order to prove a claim of deliberate indifference to a serious medical need based on an alleged delay or interference with medical treatment, a prisoner must show that he suffered substantial harm by the delay.” Turner v. County of Washoe, 759 F.Supp 630 (D. Nev. 1991).

Here, just as with his negligence claim, Clemons fails to allege any harm caused by Acevedo. Clemons makes no allegations suggesting that some harm could have been prevented had Nurse Acevedo acted the way Clemons wanted her to, as opposed to completing her duty of attending to other inmates who waited in line. Additionally, Clemons admits that Acevedo, along with the rest of the prison’s medical staff, regularly and frequently attended to many of his more serious health complaints. Clemons has failed to state a claim for which relief can be granted. Accordingly, the Eighth Amendment claims against Acevedo are dismissed.

### **III. Request for Injunction**

Clemons’ prayer requests injunctive relief requiring Defendants to provide proper medical treatment. Clemons has since been transferred to another prison facility at which Nurse Acevedo does not work. A case is moot when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome. Powell v. McCormack, 395 U.S. 486, 496 (1969). Since Clemons is no longer confined at the prison where Acevedo works, his request for an injunction is moot and cannot be granted.

### **IV. Prejudice**

When there are no facts which can be proven under amendment to the pleadings that will constitute a sufficient claim, an amendment would be futile and the claims should be dismissed with prejudice. See Miller v. Rykoff-Sexton Inc., 845 F.2d 209, 214 (9th Cir. 1988). Here, Clemons does not allege any facts that support a claim that Acevedo caused him harm and further, he has provided

1 no facts whatsoever that indicate the plausibility of a physician-patient privilege claim. Accordingly,  
2 the Court finds that any amendment to the claims against Acevedo would be futile.

3 **IV. Conclusion**

4 Accordingly, **IT IS HEREBY ORDERED** that Defendant Elizabeth L. Acevedo's Motion to  
5 Dismiss (#18) is **GRANTED with prejudice**;

6 DATED this 25<sup>th</sup> day of July 2011.

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10 Kent J. Dawson  
11 United States District Judge  
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